No #626

Supreme Court of the United States

OCTOBER TERM, 1947

No. 627

ESTATE OF MARTHA W. COLLINS, Deceased, Seward B. Collins and Bank of New York, Executors,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, the Estate of Martha W. Collins, deceased, Seward B. Collins and Bank of New York, Executors, respectfully show:

Summary Statement of the Matter Involved

The essential facts, as stipulated by the parties (R. 11-16, 47)[1] and found by The Tax Court of the United States (R. 6) may be summarized as follows:

The decedent created an *inter vivos* trust dated July 2, 1919, amended January 31, 1922, which was subject to revo-

[1] The references "R." are to the Appendix in the Circuit Court of Appeals, a certified copy of which is filed herewith.

cation by the decedent during the lifetime of her husband and became irrevocable on September 11, 1927 on his death (R. 12, 13).

The trust instrument (R. 29-39), as amended (R. 40-45), provided that the trust income was to be paid to decedent during her lifetime, or to others if she remarried (which event never occurred). At decedent's death the principal of the trust was to be divided into three parts, one-half to be set aside for her husband and one-quarter to be set aside for each of her two named sons (R. 40-41), the income from each such share to be paid to the named son or husband for life, and, in the case of each son's share, the remainder to his surviving children and their issue; if none, then to such persons as the son should by Will appoint, or in default of appointment, to such son's then surviving wife, if any, and if none, to the other son or his issue (R. 41-42). If decedent's husband predeceased decedent, his share was to become part of the shares of the two sons (R. 43), and if either son predeceased the decedent his share was, at the decedent's death, to be paid to his issue, *per stirpes,* or, if he left no issue surviving him, to be added to the share for the surviving son (R. 42). In the event both the decedent's husband and sons predeceased her, then upon her death the principal of the trust was to be distributed as the decedent by her Will might appoint (R. 44). Since one of the decedent's sons survived the decedent (R. 15) this last provision of the trust instrument never became operative.

Decedent's husband died September 11, 1927, and one son died without issue surviving him on September 27, 1940 (R. 14). Therefore, the decedent's surviving son became entitled to have added to the principal of his trust the parts which would otherwise have been set aside for his father and brother, and, since the death of the decedent, the entire principal of the trust has been held in trust for the surviving son (R. 14).

Decedent died a resident of New Canaan, Connecticut, on October 4, 1941, leaving a last Will and Testament (R. 17-28) which was duly admitted to probate by the Pro-

bate Court of the District of New Canaan, Connecticut (R. 11). At the time of her death decedent was 71 years of age and her surviving son was 42 years old (R. 13). He was married, and his wife was 48 years of age. They adopted a child on January 3, 1942, who had been born May 18, 1939 and who is still living (R. 15). Petitioners filed an estate tax return for the estate (R. 11-12).

Respondent, claiming that the trust was includible in the decedent's gross estate under Section 811(c) of the Internal Revenue Code as a transfer intended to take effect at death (R. 7-8), subsequently determined a deficiency in estate tax of $557,258.15 (R. 11-12), substantially all of which, before deduction of any credit for state taxes, was attributable to the inclusion in the gross estate of $889,650.84, the value on the optional valuation date of the principal of the trust created by the decedent (R. 12, 15). No question of contemplation of death is involved (R. 16).

The actuarial value for estate tax purposes of decedent's power to appoint the trust corpus if she survived her surviving son was $72,522.64 at her death (R. 47).

Petitioners sought a redetermination of the deficiency by The Tax Court and thereafter paid $382,357.97, representing the amount determined to be due by respondent after certain credits for state taxes (R. 12, 15-16).

Petitioners contended before The Tax Court that no part of the corpus of the trust should be included in the gross estate, or, in the alternative, if any part of the value of the trust should be included, such value should be $72,522.64 and no more. The Tax Court held that the case was controlled by the decision of this Court in *Fidelity-Philadelphia Trust Co.* (*Stinson Estate*) v. *Rothensies,* 324 U. S. 108 (1945), and, therefore, that the entire value of the trust corpus was properly included in the estate. After adjustments by agreement between the parties (R. 16), The Tax Court entered decision for petitioners for an overpayment of $7,588.02 (R. 10).

On petition to review (R. 2, 4), the Circuit Court of Appeals affirmed in the following *per curiam* opinion:

> "Affirmed on authority of *Commissioner* v. *Bayne's* Estate, 155 Fed. (2) 475 (C. C. A. 2)." (R. 56)

The opinion of The Tax Court (R. 5-9) is reported at 5 T. C. 1276. The *per curiam* opinion of the Circuit Court of Appeals (R. 56) is reported at 164 F. 2d 276.

Jurisdictional Statement

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Section 1141(a) of the Internal Revenue Code, 53 Stat. 164, and Section 240(a) of the Judicial Code, as amended (Act of March 3, 1891, c. 517, § 6, 26 Stat. 828; Act of March 3, 1911, c. 231, § 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, § 1, 43 Stat. 938; U. S. C. Title 28, § 347). The judgment of the Circuit Court of Appeals was entered on November 26, 1947 (R. 57).

Questions Presented

1. Whether the decedent made a transfer, by an *inter vivos* trust, intended to take effect in possession or enjoyment at or after her death within the meaning of Section 811(c) of the Internal Revenue Code by reason of the fact that the trust gave decedent a power to appoint by will on the happening of certain contingencies before her death, which contingencies never occurred.

2. If there was such a transfer, whether the entire value of the corpus of the trust should be included in decedent's gross estate for estate tax purposes or whether the amount to be so included should be limited to $72,522.64, the actuarial value of the possibility that the decedent might acquire a power to appoint the trust corpus.

Statute and Regulations Involved

The pertinent statute and Treasury Regulations are set forth in the Appendix, *infra*, pp. 11-12.

Specification of Errors to be Urged

The Circuit Court of Appeals for the Second Circuit erred:

(1) In holding that any part of the value of the corpus of the trust estate should be included in decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after decedent's death under Section 811(c) of the Internal Revenue Code.

(2) In failing to hold that if any part of the value of the corpus of the trust should be included in decedent's gross estate such value is $72,522.64 and no more.

(3) In failing to reverse the decision of The Tax Court of the United States.

Reasons Relied on for Allowance of the Writ

1. One question presented in this case and decided by the Circuit Court of Appeals is before this Court in *Commissioner* v. *Estate of Spiegel,* 159 F. 2d 257 (C. C. A. 7th 1946), certiorari granted 331 U. S. 798 [No. 52], and *Commissioner* v. *Estate of Church,* 161 F. 2d 11 (C. C. A. 3rd 1947), certiorari granted 331 U. S. 803 [No. 96].

The Circuit Court of Appeals in the instant case was of the opinion that this case was governed by its opinion in *Commissioner* v. *Bayne's Estate,* 155 F. 2d 475 (1946). There, the income from a trust was payable to the grantor for life, remainder in equal shares, *per stirpes,* to the then surviving children of the grantor and the issue of deceased children or, in default thereof, in equal shares, *per stirpes,* to the surviving brothers and sister of the grantor and the issue of such of them as may have predeceased him. There was a possibility that the property might revert by operation of law to the estate of the grantor after the grantor's death if his descendants and brothers or sister and their descendants should fail. The Circuit Court of Appeals, relying on *Fidelity-Philadelphia Trust Co.* (*Stinson Estate*)

v. *Rothensies, supra,* and *Commissioner* v. *Estate of Field,* 324 U. S. 113 (1945), held the trust fund taxable in the grantor's estate. The Circuit Court concluded that this Court had made no distinction in the foregoing cases between reversions expressly reserved by trust instrument and reversions created by operation of law.

Since the Circuit Court in holding that the instant case is governed by the *Bayne* case has apparently made no distinction between a reversionary interest by operation of law and the possibility of acquiring a power of appointment expressly reserved by the trust instrument, the *Bayne* case and the instant case present the same issue which is now before this Court in the *Spiegel* and *Church* cases and should be decided in this case.

2. The position of respondent in the courts below is in conflict with *May* v. *Heiner,* 281 U. S. 238 (1930), *Morsman* v. *Burnet,* 283 U. S. 783 (1931), and *Hassett* v. *Welch,* 303 U. S. 303 (1938).

In *May* v. *Heiner* this Court held that a transfer in trust with income reserved by the settlor for life and remainders over was not embraced within the statutory language of the then equivalent of Section 811(c) of the Internal Revenue Code as a transfer intended to take effect in possession or enjoyment at or after death. In *Hassett* v. *Welch* it was held that Congress did not intend to apply the amendment made to Section 302(c) of the Revenue Act of 1926 by Joint Resolution of March 3, 1931 so as to subject to estate tax transfers made prior thereto in which the settlor reserved the income to himself for life.

Similarly in the present case at the moment of her death the decedent retained no greater interest in the property than the decedents in *May* v. *Heiner* and *Hassett* v. Welch. She retained only a life estate. The power to appoint could only arise upon contingencies *before* her death. They never arose, and the decedent died without any interest save the life estate.

A sharp distinction should be made between this situation and the situation before the Court in the *Stinson* case

relied on by The Tax Court. In the *Stinson* case the decedent possessed at the date of her death, and actually exercised, the power to determine who the ultimate beneficiaries of the property would be in the event her daughters should *at any time after her death* die without issue. Thus, at the date of death, the decedent actually possessed and exercised the power to determine who the ultimate beneficiaries might be, and it presumptively appeared at the date of death that the property would be distributed under the power of appointment actually exercised by her.

In the present case the decedent had nothing at the time of her death other than the life estate. To hold that the mere reservation of a life estate makes the transfer taxable is contrary to *May* v. *Heiner* which has not been overruled.

Furthermore, before the decision in the case of *Helvering* v. *Hallock*, 309 U. S. 106 (1940), this Court had applied the doctrine of *May* v. *Heiner* to cases where the grantor had reserved a life estate and where under the terms of the trust instrument he also had a reversionary interest by operation of law. See *Morsman* v. *Burnet*, 283 U. S. 783 (1931), reversing *per curiam Commissioner* v. *Morsman*, 44 F. 2d 902.

Any holding that the transfer in the instant case is taxable is in conflict with *May* v. *Heiner*, *Morsman* v. *Burnet*, and *Hassett* v. *Welch*.

Indeed, the recently amended Treasury Regulations point up the conflict between the respondent's position and the above cases. By a Treasury Decision of May 1, 1946, the Regulations were amended to provide that the mere presence of a possibility of reverter, or its assumed equivalent, the possibility of acquiring a power of appointment, is not sufficient to require inclusion of the trust property in a decedent's gross estate. T. D. 5512 (Reg. 105, Section 81.17, as amended by T. D. 5512, 1946-1 Cum. Bull. 264, see Appendix, *infra*, pp. 11-12). To be includible under present Treasury Regulations the transfer must be conditioned on survivorship of the grantor. Despite the reaffirmation of this test in the current Regulations, the Commissioner nevertheless still contends that if (in addition

to the presence of a possibility of reverter or a possibility of acquiring a power of appointment) the decedent retains a life estate, the property is includible in the gross estate even though the transfer was made prior to the Joint Resolution of March 3, 1931 referred to in *Hassett* v. *Welch*, *supra*, and even though apart from the life estate the transfer would not be includible in the gross estate because not conditioned on survivorship. Such is the situation in the instant case. Had not the decedent retained a life estate, the case at bar would fall squarely within Example 2 of Regulations 105, Section 81.17, as amended by T. D. 5512 (see Appendix, *infra*, p. 12), and, in accordance therewith, no contention would now be made that the property is includible in the gross estate.

3. The decision below is also inconsistent with the decisions of this Court in *Smith* v. *Shaughnessy*, 318 U. S. 176 (1943); and *Robinette* v. *Helvering*, 318 U. S. 184 (1943).

In the *Smith* and *Robinette* cases, this Court held that transfers in trust were subject to gift tax as completed gifts during lifetime despite the existence in each case of a possibility of reverter or a possible disposition of the property by the settlor's will. The possibility of reverter in the *Smith* case could be valued by actuarial methods, and its value was excluded from the taxable gift; the possibility that the trust property might pass under the donor's will in the *Robinette* case was so remote that it could not be valued by actuarial methods, and the full value of the transferred property less the value of the life estate reserved by the settlor was subjected to the gift tax. The converse of the principle of the *Smith* and *Robinette* cases should apply under the estate tax, and to the extent that the transfer is a completed gift during lifetime, it should not be regarded as a transfer which takes effect at or after death—that is to say, at very most only the actuarial value of the possibility that the decedent might acquire a power to appoint should be included in the taxable estate.

Prayer for Writ

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit commanding said last named Court to certify and send to this Honorable Court a full and complete transcript of the record of all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet and the circumstances of the case require and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem proper.

Dated: New York, N. Y., February 24, 1948.

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Appendix

INTERNAL REVENUE CODE:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(c) *Transfers in contemplation of, or taking effect at death.* To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * * *

(26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

SEC. 81.17 [as amended by T. D. 5512, 1946-1 Cum. Bull. 264]. *Transfers intended to take effect at or after the decedent's death.*—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

* * * * *

Example (*2*). The decedent, during his life, transferred property in trust, giving the income therefrom to his son for life and the remainder to his son's surviving issue. If no issue survived the life tenant, the property was to revert to the decedent or his estate. This transfer does not satisfy requirement (1) specified above, since the life tenant's surviving issue need not survive the decedent in order to obtain possession or enjoyment of the property. Accordingly, no portion of the property is includible in the gross estate under this section.